EON Bank Bhd v Pung Chong Thai

HIGH COURT (KUALA LUMPUR) — SUIT NO 38-66 OF 1999
KAMALANATHAN RATNAM J
23 OCTOBER 2000

Civil Procedure *— Parties — Intervention — Interested party not a party to the suit — Land purchased at public auction — Applicant unable to comply with terms of auction — Balance of purchase price not paid on date stipulated — Applicant's application for extension of time rejected by senior assistant registrar — Whether intervention proper at this stage*

The applicant, a director of Nirwana Institute, had on behalf of the said institute purchased land at a public auction held by the High Court and had paid a deposit of 10%. The applicant was unable to comply with the terms of the auction stipulating that he was to pay the balance by 5 June 2000, and he therefore filed an application to have the final date extended by three months. The application was heard and dismissed with costs by the senior assistant registrar. To date, there has been no appeal. The applicant applied to be made a party to the proceedings so that he can make an application to extend time to pay the balance.

Held, allowing the application with costs:

(1) Though the plaintiff might have had knowledge of the existence of the 20 caveats earlier, that ought not to prevent the plaintiff from being an 'aggrieved party' in law as something wrongful had been done to the plaintiff that affected its title to the property. It would seem therefore that the plaintiff in this case can, if he wants to, even apply to remove the caveats and for all of these he wishes to be made a party (see p 413D–E).

(2) The applicant is acting as the director of the Institute Nirwana, having directly entered into an agreement with the plaintiff bank which did not disclose that there were 11 caveats on the said land. The applicant now wants to intervene. In the judgment of the court, he has a legal interest, not a mere commercial interest. Even principles of equity will demand that he be allowed the right to intervene. Once he intervenes and makes whatever application, the plaintiff bank can then oppose that application at that stage, if it wishes to do so (see p 414B–C).

(3) Counsel for the bank confirmed that the bank has not as yet forfeited the said sum. To the mind of the court, the non-forfeiture by the plaintiff must be given some meaning. Even assuming it is indulgence, there was no requirement to do that. On the contrary, once indulgence is given, then it must be construed that the plaintiff was willing to allow the applicant to pursue his right to intervene (see p 414G–H).

[Bahasa Malaysia summary

Pemohon tersebut, seorang pengarah Institut Nirwana, telah bagi pihak institut tersebut membeli tanah di satu lelong awam yang diadakan oleh Mahkamah Tinggi dan telah membayar cagaran sebanyak 10%. Pemohon tidak mampu memenuhi terma lelong tersebut yang menghendakinya membayar baki sebelum 5 Jun 2000, oleh itu beliau memfailkan satu permohonan untuk melanjutkan tempoh tamat sebanyak tiga bulan. Permohonan itu dibicarakan dan ditolak dengan kos oleh penolong kanan pendaftar. Setakat ini, terdapat tiada rayuan. Pemohon memohon dijadikan pihak dalam prosiding.

Diputuskan, membenarkan permohonan tersebut dengan kos:

(1) Walaupun plaintif mungkin sedar akan kewujudan 20 kaveat sebelumnya, ini tidak patut menghalang plaintif dari menjadi 'pihak yang terkilan' di bawah undang-undang kerana satu kesalahan telah dilakukan terhadap plaintif yang menjejaskan hakmiliknya terhadap harta tersebut. Kelihatan bahawa plaintif dalam kes ini boleh, jika beliau ingin berbuat demikian, memohon untuk membatalkan semua kaveat-kaveat tersebut dan bagi semua ini beliau ingin dijadikan seorang pihak (lihat ms 413D–E).

(2) Pemohon bertindak sebagai pengarah Institut Nirwana, dan telah secara langsung menandatangani satu perjanjian dengan bank plaintif yang tidak mendedahkan bahawa terdapat sebelas kaveat pada tanah tersebut. Pemohon kini ingin campurtangan. Dalam penghakiman mahkamah, beliau mempunyai kepentingan di bawah undang-undang, bukan hanya kepentingan komersil. Prinsip-prinsip ekuiti mewajibkan beliau diberi hak campurtangan. Sebaik sahaja beliau campurtangan dan membuat apa-apa permohonan, bank plaintif boleh membangkang permohonan tersebut pada tahap itu, jika ia ingin berbuat demikian (lihat ms 414B–C).

(3) Peguam bagi pihak bank mengesahkan bahawa bank belum, pada setakat itu, melucuthak jumlah tersebut. Dalam minda mahkamah, perbuatan tidak melucuthak itu membawa maksud tersendiri. Walaupun perbuatan itu dianggap satu pengampunan, tidak ada keperluan baginya berbuat demikian. Sebaliknya, jika pengampunan diberikan, ia mestilah ditafsirkan bahawa plaintif sanggup membenarkan pemohon menegaskan hak campurtangan beliau (lihat ms 414G–H).

Notes

For cases on intervention of parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

Cases referred to

Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon [1991] 2 MLJ 246 (refd)
Hong Leong Finance Bhd v Staghorn Sdn Bhd [1995] 2 MLJ 847 (refd)
Malayan United Finance Bhd, Johor Bahru v Liew Yet Lan [1990] 1 MLJ 317 (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors [1994] 1 MLJ 136 (refd)
Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(a)
National Land Code 1965 s 259(3)(a)
Rules of the High Court 1980 O 15 r 6, (2)(b)(i), O 16 r 6(2)(b)(ii), O 83

Foo Li Mei (*David Chong & Co*) for the applicant/intervenor.
Karen Kaur Bal (*Teh & Yeoh*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

The applicant is moving this court to be made a party to these proceedings pursuant to O 15 r 6 of the Rules of the High Court 1980 ('the RHC'). In his affidavit in support, he has averred that as a director of Nirwana Institute he had on behalf of the said institute purchased land held under HS(D) 40108 No PT 12550, Mukim Ampang, Daerah Hulu Langat, Negeri Selangor ('the said land') at a public auction held by the High Court Kuala Lumpur for a purchase price of RM333,000, and had paid on 6 March 2000 a deposit of 10% amounting to RM33,300. Pursuant to the terms of the auction, he was to have paid the balance of the purchase price on or before 5 June 2000. Being unable to do so by the said date, the applicant on 2 June 2000 filed an application to extend the final date of payment by a further three months from 5 June 2000. This application was heard by the learned senior assistant registrar ('SAR') on 11 July 2000 who dismissed it with costs. To date there is no appeal to the judge against this order. In the meantime, the applicant has filed this application (encl 38) to enable him to be made a party.

Findings of the court

In support of encl 38, the applicant has averred that in dismissing the earlier application on a preliminary issue, the learned SAR had granted him leave to file an application to enable him to be made a party to the proceedings. The main thrust of the applicant's reason is that he has been unable to obtain a loan from any bank because of the existence of two private caveats

lodged over the said land. He then made an official search which he exhibited and which disclosed the existence of 11 private caveats being lodged over the said land. It was on this score that he was compelled to file the earlier application. In spite of the caveats, he has since obtained from a leasing company an offer of a loan for RM250,000. The said offer letter was also exhibited. All he wants in this application is that he be made a party so that he can make an application to extend time to pay the balance. He would also have to apply to remove the caveats. He would only be able to do these if he had the locus standi, and it was his case that he therefore ought to be made a party.

The plaintiff in opposing this application, contended that I ought not to consider this application since O 15 r 6 of the RHC will come into play in respect of any matter or proceeding, and in this case there no longer was any matter or proceeding once an order for sale was made on 7 December 1998 and when the auction had been fixed for 24 January 2000. It was the case of the plaintiff that this court is now *functus officio* because on 6 April 2000, by way of a public auction, a fresh contract has been entered into between the plaintiff and the applicant with fixed terms as contained in the proclamation of sale which was also exhibited. The bank argued that it was eligible to forfeit the deposit paid since more than three months had expired since the making of the order for sale and no settlement had been effected by the applicant.

Whilst I agree that the proclamation of sale discloses that the said property has been charged to the plaintiff and that there is a note in the proclamation of sale advising bidders at the public auction to make a search in the Land Office prior to the auction, I note that the subsequent search made by the applicant discloses the existence of 11 caveats. This has not been disclosed, nor explained in the proclamation of sale. After all, the applicant wishes to be made a party to these proceedings. Since the plaintiff has also conceded in its submission that there is a fresh agreement by way of the order for sale entered into by the plaintiff and the applicant on the date of the public auction, the applicant might wish to raise the issue regarding the non-disclosure of the 11 caveats or he may wish to set aside the order for sale on such or other grounds. I am of the view that the applicant has indeed satisfied me that he has the locus standi to be made a party to these proceedings pursuant to O 15 r 6(2)(b)(i) and (ii) of the RHC, which read as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
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> ...
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> (b) order any of the following persons to be added as a party, namely —
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to

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> or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
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> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

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I am of the view that the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 had expressed the rationale behind this order very succinctly in the words of Lord Diplock at p 55, wherein his Lordship said:

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> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard.

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In *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136, the plaintiff, a successful bidder at a public auction, applied to remove 20 existing caveats over the said property on the basis of being an 'aggrieved party'. The court held that though the plaintiff might have had knowledge of the existence of the 20 caveats earlier, that ought not to prevent the plaintiff from being an 'aggrieved party' in law as something wrongful had been done to the plaintiff that affected its title to the property. It would seem therefore that the plaintiff in this case can, if he wants to, even apply to remove the caveats and for all of these he wishes to be made a party.

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Ms Karen Bal for the bank argued that since O 15 r 6(2) of the RHC relates to an application being made 'at any stage of the proceedings' 'in any cause or matter', such a rule cannot apply to the situation before me since there was no longer any ongoing proceedings to enable the applicant to intervene, once the order for sale had been made, and the deposit paid. In support, counsel relied on a decision of the Court of Appeal in *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 wherein the court had held, that although O 15 r 6(2) of the RHC states that an application to intervene could be made 'at any stage of the proceedings', this does not mean that such application can be made after final judgment had been entered. In fact, in that case the Court of Appeal went further to hold that the applicant took out the application after judgment had been perfected. To my mind, *Tai Choi Yu* can easily be distinguished. There, the applicant, a minority shareholder in a company called New Tingan Timber Sdn Bhd ('NTT') applied to intervene in a case where the respondent obtained judgment in default of appearance against NTT. When the statutory notice under s 218(1)(a) of the Companies Act 1965 to wind up NTT was served on the company and the applicant minority shareholder, the latter called for a meeting of the board of directors of NTT. At that meeting it was resolved not to apply to set aside the judgment in default on the basis that NTT had no defence to the action, and further that NTT was insolvent. Having been unable to persuade the board, the applicant, on his own, applied to

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intervene. It was against these background facts that the Court of Appeal arrived at that decision. In fact, the Court of Appeal went further to hold that before the court could grant leave to intervene, an applicant must show that he has an interest directly related to the subject matter of the action and it was the opinion of the Court of Appeal that a mere shareholder, a fortiori, a minority shareholder has no such interest, legal or equitable, in the property of a company. The case before me is entirely different. The applicant is acting as the director of the Institute Nirwana, having directly entered into an agreement with the plaintiff bank which did not disclose that there were 11 caveats on the said land. The applicant now wants to intervene. In my judgment he has a legal interest, not a mere commercial interest. Even principles of equity will demand that I allow him the right to intervene. Once he intervenes and makes whatever application, the plaintiff bank can then oppose that application at that stage, if it wishes to do so. In support of the 'at any stage of the proceedings' argument, the plaintiff referred me to yet another decision of the Court of Appeal in *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [1995] 2 MLJ 847. In that case, a bidder at a public auction paid the applicant the full purchase price for the said land bought at a public auction. A certificate of sale was then issued in accordance with s 259(3)(a) of the National Land Code 1965 ('the NLC') by the registrar of the High Court. Almost two years later, the respondent (Staghorn) filed an application for leave to intervene in the proceedings to set aside the sale. The court held, and rightly too, that the issuance of the certificate of sale by the High Court registrar pursuant to s 259(3)(a) of the NLC was the final stage of the proceedings for an order for sale under O 83 of the RHC. In the circumstances, the Court of Appeal held that the order for intervention granted by the High Court had not been made 'at any stage of the proceedings' as required by O 15 r 6(2) of the RHC. Here, there is no evidence that the certificate of sale has been issued. In any case, it cannot be issued pursuant to s 259(3)(a) of the NLC since the full purchase price has not been paid as yet.

I note that by a letter dated 25 May 2000, the plaintiff addressed a letter directly to the applicant and informed him that since the final date for the payment of the balance of the purchase price of RM299,700 was 5 June 2000, the plaintiff could forfeit the said sum after that date. To a question from the court, Ms Karen Bal for the bank confirmed that the bank has not as yet forfeited the said sum. To my mind, the non-forfeiture by the plaintiff must be given some meaning. Even assuming it is indulgence, there was no requirement to do that. On the contrary, once indulgence is given then it must be construed that the plaintiff was willing to allow the applicant to pursue his right to intervene.

Counsel for the bank relied on *Malayan United Finance Bhd, Johor Bahru v Liew Yet Lan* [1990] 1 MLJ 317 and urged me to hold that this court will have no right to extend the time for completion without the consent of the chargee. In that case, after the final date for payment had expired, the successful bidder obtained an ex parte order before the senior assistant registrar, granting a period of extension, and before that extended period could expire, the successful bidder paid the balance. The plaintiff's

application to set aside the ex parte order was dismissed. On appeal, the learned judge held that the learned SAR ought not to have entertained the ex parte application. However in *Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon* [1991] 2 MLJ 246, another High Court held that the learned SAR had no power to entertain any application to vary the final date of completion, and that such an application ought to be made before the learned judge. Whilst the court in *Liew Yet Lan* held that the chargee ought to be consulted, the court in *Kim Ming Choon* has held that any variation of the date of final completion would affect the chargor and he should be heard as he would be the affected party who would have 'to bear further interest charges levied by the chargee'. Faced with these conflicting decisions, it is only proper that leave be given to the applicant to argue his case fully.

Having considered this matter fully it is my judgment that the applicant ought to be given leave under O 15 r 6(2) of the RHC to intervene in these proceedings, and that the costs be borne by the applicant himself.

Application allowed with costs.

Reported by Wong Ee Lynn